Supreme Court, U.S.
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No. 93-1841

In The

Supreme Court of the United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

FEDERICO PENA, Secretary of Department of Transportation; THOMAS D. LARSEN, Administrator of the Federal Highway Administration; LOUIS N. MACDONALD, Administrator Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Respondents.

On Writ Of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

PETITIONER'S BRIEF

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ISSUES PRESENTED

1. Whether, in an as applied challenge, a congressional race-conscious set-aside program for awarding highway construction contracts survives constitutional scrutiny when that program seeks to remedy alleged broad-based societal discrimination, rather than clearly identifiable discrimination perpetuated by the governmental entity seeking to remedy the discrimination?

2. Whether "strict scrutiny," as opposed to "a lenient standard, resembling intermediate scrutiny," is the proper standard of review for determining the constitutionality of a race-conscious program adopted by Congress?

3. Whether the Fifth Amendment requires a federal agency, in implementing a federal race-conscious, set-aside program and when exceeding the goals adopted by Congress, to conduct the inquiry set forth in *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989)?

LIST OF PARTIES

Adarand Constructors, Inc. (Adarand) was Plaintiff in the United States District Court for the District of Colorado and Appellant before the United States Court of Appeals for the Tenth Circuit. Adarand is a corporation organized under the laws of the State of Colorado. Adarand has no parent or subsidiary corporations.

The following were Defendants in the United States District Court for the District of Colorado and Appellees before the United States Court of Appeals for the Tenth Circuit: Samuel K. Skinner, in his official capacity as Secretary of the Department of Transportation (Mr. Skinner has since been replaced in his official capacity by Federico Pena); Robert E. Farris, in his official capacity as Administrator of the Federal Highway Administration (Mr. Farris has since been replaced in his official capacity by Thomas D. Larsen); Louis N. MacDonald, in his official capacity as Administrator of Region VIII of the Federal Highway Administration; and Jerry Budwig, in his official capacity as Division Engineer of the Central Federal Lands Highway Division.

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OPINIONS BELOW

Review is sought of the opinion of the United States Court of Appeals for the Tenth Circuit, dated February 16, 1994, reported as *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994) and reproduced at pages 1 to 26 of the Appendix to The Petition for *Writ* of *Certiorari* (App.). The opinion and order of the District Court, dated April 21, 1992, *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240 (D.Colo. 1992), are reproduced at App. 26 to 38.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment against Petitioner on February 16, 1994. (R. 10th Cir. # 26.)[1] The petition for *writ* of *certiorari* was filed on May 17, 1994. (R. 10th Cir. # 29.) The *writ* of *certiorari* was granted on September 26, 1994. (R. 10th Cir. # 31.)

The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner's challenge is based upon the Equal Protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution. The Fifth

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[1] The Joint Appendix is designated as J.A. The Appendix to Petition for *writ* of *certiorari* is designated as "App." The record from the Tenth Circuit Court of Appeals is designated "R. 10th Cir. #," with the docket number and pages identified. The record from the United States District Court for the District of Colorado is designated "R. Colo. #," with the docket number and pages identified.

Amendment provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . "

Respondents maintain that the challenged agency action is authorized by § 502 of the Small Business Act, (SBA) 15 U.S.C. § 644(g). (App. at 39-40.) The SBA, which applies to all federal procurement activities, requires the President to set an annual "goal" of not less than 5% for small businesses owned and controlled by "socially and economically disadvantaged individuals." 15 U.S.C. § 644(g)(1). The statute then states, in pertinent part:

> Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for . . . small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency.

Id. The phrase "socially disadvantaged individuals" is defined as:

> Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

15 U.S.C. § 637(a)(5). The phrase "economically disadvantaged individuals" is defined as:

> Economically disadvantaged are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

15 U.S.C. § 637(a)(6). Moreover, racial minorities are "presume[d]" to be "socially and economically disadvantaged":

> As used in this contract, the term "small business concern" shall mean a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern –
>
> (i) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and
>
> (ii) whose management and daily business operations are controlled by one or more of such individuals.
>
> The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.

15 U.S.C. § 637(d)(3)(C).

Funding for the project at issue in this case was provided by § 106 of the Surface Transportation and

Uniform Relocation Assistance Act of 1987 (STURAA) which provides, in pertinent part:

> (a) FROM THE HIGHWAY TRUST FUND. – For the purpose of carrying out the provisions of title 23, United States Code, the following sums are hereby authorized to be appropriated . . . :
>
> * * *
>
> (8) FOREST HIGHWAYS. – For forest highways $55,000,000 per fiscal year for each of fiscal years 1987, 1988, 1989, 1990, and 1991.
>
> (c) DISADVANTAGED BUSINESS ENTERPRISES. –
>
> (1) GENERAL RULE. – Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under titles I and III of this Act or obligated under titles I, II, and III (other than section 203) of the Surface Transportation Assistance Act of 1982 after the date of the enactment of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.
>
> (2) DEFINITIONS. – For purposes of this subsection –
>
> (A) SMALL BUSINESS CONCERN. – The term "small business concern" has the meaning such term has under section 3 of the Small Business Act (15 U.S.C. 632); except that such term shall not include any concern or group of concerns controlled by

> the same socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of $14,000,000, as adjusted by the Secretary for inflation.
>
> (B) SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS. – The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto . . . .

Pub. L. 100-17, 101 Stat. 144-46 (1987), §§ 106(a) and (c).

STATEMENT OF THE CASE

A. Facts and Background

This case presents a challenge to a federal program, hereinafter "the Federal Construction Procurement Program," authorized by § 502 of the Small Business Act, 15 U.S.C. § 644(g), and funded by § 106(a)(8) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. 100-17, 101 Stat. 132 (1987). The Federal Construction Procurement Program, which is funded by STURAA and which Respondents maintain is authorized by § 502 of the SBA [15 U.S.C. § 644(g)], provides the authority for a provision included in highway construction contracts by the Central Federal Lands Highway Division (CFLHD) entitled the "Subcontracting

Compensation Clause" (SCC).[2] The SCC is quoted in its entirety in the Joint Appendix at pages 24-27. Although Adarand does not challenge the constitutionality of STURAA, Adarand does challenge the constitutionality of § 106(c) of STURAA since it is that provision that incorporates by reference 15 U.S.C. § 637(d) of the SBA and thereby provides the "presumption" that listed minorities are "disadvantaged." The SCC is designated as § 108 of all sealed bids for highway construction contracts issued by the CFLHD.[3] (J.A. 24-27).

As a contracting agency within the FHWA, the CFLHD is apportioned a share of the FHWA's annual goal for small "disadvantaged" business participation. (R. 10th Cir. # 11, Aplt. App. 349-350.) The small disadvantaged business goal established by the FHWA for the CFLHD was between 12% and 15% of the approximately $40 million in funding that the CFLHD receives annually for its highway construction projects. (R. 10th Cir. # 11, Aplt. App. 347.) The CFLHD uses three means to achieve its share of the goal: (1) awarding contracts to small "disadvantaged" businesses by competitive bid; (2) awarding contracts to the Small Business Administration under the section 8(a) program, 15 U.S.C. § 637(a), which then allocates the contracts to "disadvantaged" firms

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[2] The CFLHD is a regional subsidiary of the Federal Lands Highway Program (FLHP). The FLHP is subordinate to the Federal Highway Administration (FHWA), which is, in turn, part of the U.S. Department of Transportation (DOT).

[3] "[T]he [SCC] clause is included in all sealed bidding contracts, it is not included in the 8(a) contracts. . . . [Because the 8(a) contracts go exclusively to Disadvantaged Business Enterprises], we do not put the SCC into those contracts." (R. 10th Cir. # 14, DOT App. 74-75.)

only; and (3) encouraging firms, by means of financial incentives, that win prime contracts to award subcontracts to "disadvantaged" firms.[4] It is the third mechanism that is at issue in this case. The CFLHD required the inclusion of the SCC provision in its sealed bid contracts as a means of achieving the goals established pursuant to 15 U.S.C. § 644(g). (R. 10th Cir. # 11, Aplt. App. 316-317 & Aplt. App. 342.)[5]

Adarand Constructors, Inc., (Adarand) is a highway construction company that specializes in the installation of highway guardrail systems and highway signs. Adarand has been engaged continuously in this business since 1976 and has substantial expertise in the performance of these tasks. (J.A. 33.) Adarand is not eligible for a presumption that it qualifies for certification as a "Disadvantaged Business Enterprise" under the SBA because its "management and daily business operations are controlled by" Randy Pech, who is a white male. (J.A. 32.) 15 U.S.C. § 637(d)(3)(C).

The function of the CFLHD is to supervise the construction and maintenance of highways on federally-

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[4] (R. 10th Cir. # 11, Aplt. App. 316-317; Aplt. App. 342; Aplt. App. 345-346.)

[5] At the end of each fiscal year, federal agencies, including DOT, submit reports to the Small Business Administration on the extent of federal procurement contracting participation by small businesses and DBEs, including an explanation of any failure to meet the agency-wide goal. 15 U.S.C. § 644(h). The reports are compiled by the Small Business Administration and submitted to the President and Congress. *Id.*

owned lands within its geographic region.[6] The CFLHD does not certify businesses as Disadvantaged Business Enterprises.[7] Rather, it relies on the states and the Small Business Administration to provide that certification.

On August 10, 1989, the CFLHD issued a solicitation for bids for the construction of a 4.7 mile section of highway located in the San Juan National Forest (the West Dolores Project). (R. 10th Cir. # 11, Aplt. App. 103-312.) The West Dolores Project is located approximately 400 miles from Denver in the extreme southwestern corner of Colorado in Montezuma and Dolores Counties near the Four Corners Area. The construction site is located hundreds of miles from Salt Lake City, Utah; Albuquerque, New Mexico; and Phoenix, Arizona. Furthermore, both counties in which this project took place are sparsely populated: 10.05 and 1.34 people per square mile, respectively.[8]

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[6] The geographic region of the CFLHD includes all or part of the following states: Colorado, Nebraska, North Dakota, California, Wyoming, Utah, Arizona, New Mexico, Texas, South Dakota, Nevada, Kansas, and Hawaii. (R. 10th Cir. # 11, Aplt. App. 319-320.)

[7] The CFLHD accepts, as a DBE, any entity certified as such by a "state or the Small Business Administration." (R. 10th Cir. # 14, DOT App. 44-45; DOT App. 104; and R. 10th Cir. # 11, Aplt. App. 315). "[T]he type of proof of social disadvantage accepted by CFLHD for purposes of its SCC provision is that type of proof required for certification of small business concerns by SBA for the 8(a) program, 15 U.S.C. § 637(a), set out in 13 C.F.R. § 124.105, and by state highway agencies for Department of Transportation programs pursuant to the standards of 49 C.F.R. §§ 23.51, 23.53 and subpart D, Appendix C." (R. 10th Cir. # 11, Aplt. App. 315)

[8] *Colorado Population Counts and Estimates, 1980-1983*, Published by the Colorado Division of Local Government.

Section 108 of the contract for the West Dolores Project was the SCC provision. (J.A. 24-27.) The SCC offered a monetary reward to all prime contractors who would hire "disadvantaged" subcontractors to perform work constituting more than 10% of the overall contract amount.[9] (J.A. 25.) The SCC was based on a uniform version of the same which was issued by the Administrator of the FLHP in 1981 and is used in all three regions of the FLHP. (R. 10th Cir. # 11, Aplt. App. 326-327.)

The term "disadvantaged business enterprise" (DBE) is presumed to include all small businesses owned and operated by Blacks, Hispanics, Asians, Native Americans, and "other minorities".[10] (48 C.F.R. § 52.219-8; 13 C.F.R. § 124.105(b)[11]; R. 10th Cir. # 11, Aplt. App. 286.) Businesses owned or operated by white men are not presumed to be "disadvantaged."

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[9] The CFLHD requires that at least 10% of the cost of the contract be awarded to one or more DBEs before a prime contractor is entitled to the bonus under the SCC. (R. 10th Cir. # 14, DOT App. 52-53). The 10% minimum is taken from the percentage required by Section 105(f) of the Surface Transportation Assistance Act, (STAA) Pub. L. 97-424, 96 Stat. 2100, and Section 106(c) of STURAA Pub. L. 100-17, 101 Stat. 145-46. (R. 10th Cir. # 14, DOT App. 103).

[10] For a highway construction company to qualify as a "small business," it may not have annual receipts that exceed $17 million. 13 C.F.R. § 121.601 (SIC 1611-1629). This represents the $14 million figure under STURRA, cited on p.5, adjusted for inflation.

[11] The "other minorities" presumed by the Small Business Administration to be "disadvantaged, include, but are not limited to, persons with origins in: Burma, Singapore, Laos, Republic of the Marshall Islands, Federated States of Micronesia, Fiji, Kiribati, Sri Lanka, and Bhutan.

The size of the bonus offered to the prime contractor under the SCC provision was equal to 10% of the final amount of the DBE subcontracts, not to exceed 2% of the final prime contract amount (1.5% if the prime contractor only contracts with one DBE subcontractor). (R. 10th Cir. # 11, Aplt. App. 286.) Moreover, the CFLHD required prospective prime contractors to include in their bids an amount for compensation under the SCC program regardless of whether the prime contractors intended to collect the bonus.[12] Thus, a prime contractor could not gain an advantage in the competition to submit the lowest-priced bid by agreeing to forego the benefits available under the SCC provision.[13] (R. 10th Cir. # 11, Aplt. App. 349.)

On September 15, 1989, the CFLHD awarded the prime contract for the West Dolores Project to Mountain Gravel & Construction Company (Mountain Gravel). (R. 10th Cir. # 11, Aplt. App. 114.) Shortly thereafter, Adarand submitted a bid to Mountain Gravel seeking to subcontract the guardrail portion of the highway construction project. (J.A. 30 & 34.) Adarand's bid quoted a lower price for the work than any other bid. (J.A. 30 & 34.) However, because of the SCC, Mountain Gravel "felt compelled to give the subcontract of the guardrail work

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[12] In this case the bonus to be included in each prime contractor's bid was $30,000.00. (R. 10th Cir. # 11, Aplt. App. 118.)

[13] The CFLHD selects the lowest responsive bid for all projects under the sealed bidding process. (R. 10th Cir. # 14, DOT App. 81). The selected prime contractor must report all DBE and non-DBE subcontracts to the CFLHD. (R. 10th Cir. # 14, DOT App. 105-106). The CFLHD includes this information in a monthly report. (R. 10th Cir. # 14, DOT App. 37).

to Gonzales Construction." (J.A. 30.) Thus, the uncontroverted evidence is that:

> the primary reason that MOUNTAIN GRAVEL & CONSTRUCTION COMPANY gave the subcontract for the guardrail to Gonzales Construction, a qualified DBE, is because Gonzales Construction is a DBE and MOUNTAIN GRAVEL & CONSTRUCTION COMPANY felt economically compelled to award its subcontract to a DBE because MOUNTAIN GRAVEL & CONSTRUCTION COMPANY was entitled to a bonus of approximately $10,000.00 for awarding the subcontract to Gonzales Construction, a qualified DBE.
>
> [B]ut for the requirements of the Federal Highway contracts which encourage prime constractors (sic) to use DBEs, MOUNTAIN GRAVEL & CONSTRUCTION COMPANY would have accepted the low bid submitted by ADARAND CONSTRUCTORS, INC., and awarded the subcontract to ADARAND CONSTRUCTORS, INC.

(J.A. 30-31.)

B. Decisions Below

On August 10, 1990, Adarand filed an action in the United States District Court for the District of Colorado challenging the constitutionality of the use, by the CFLHD, of the contract provision referred to as the SCC, since the express purpose of the SCC is to induce prime contractors, on federal highway projects, to hire subcontractors based on the race of their owners, rather than the amount of their bids.

Cross Motions For Summary Judgment were filed on April 24, 1991. In Defendants' Brief in Support of Motion for Summary Judgment, Respondents argued that "here as in *Fullilove [v. Klutznick*, 448 U.S. 448 (1980)], Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by practices that perpetuated the effects of prior discrimination." (R. Colo. # 19, Brief 21.)

In their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Further Support of Defendants' Motion For Summary Judgment (Memorandum in Opposition), Respondents argued that the "compelling governmental interest" for the Federal Construction Procurement Program is set forth in the findings of Congress as follows:

> (1) With respect to the Administration's business development programs the Congress finds –
>
> (A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of the national economy;
>
> (B) that many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control;

> (C) that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and other minorities;
>
> (D) that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;
>
> (E) that such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups;
>
> (F) that such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; and
>
> (G) that such procurements also benefit the United States by encouraging the expansion of suppliers for such procurements, thereby encouraging competition among suppliers and promoting economy in such procurements.

15 U.S.C. § 631(f)(1). (R. Colo. # 36, Brief 6-7.)

In their Memorandum in Opposition, Respondents also stated:

> Clearly, Congress had available to it in 1978 the historical record of discrimination that the Supreme Court has found sufficient to support the preferences contained in the PWEA. . . . Because the use of the SCC is directly traceable

> to Congressional findings as to the need to remedy the historical underutilization of DBEs in Federal procurement, Congress has identified the compelling interest for its use.

(R. Colo. # 36, Brief 8-9.)

On April 21, 1992, the District Court issued an opinion and order denying Adarand's Motion For Summary Judgment and granting the United States' Motion For Summary Judgment.

On August 5, 1992, after obtaining an order granting a timely-filed Motion For Extension Of Time To File An Appeal, Adarand filed a Notice Of Appeal with the United States Court of Appeals for the Tenth Circuit.

Respondents filed with the United States Court of Appeals for the Tenth Circuit the following list of "evi- 15
dence" that Congress considered when it enacted U.S.C. § 644. The items listed were as follows:

> 133 Cong. Rec. 33321 (1987) (testimony of Cong. Mfume); 133 Cong. Rec. 33321-33322 (1987) (testimony of Cong. Meyers); 133 Cong. Rec. 33322 (1987) (testimony of Cong. Gallo); Minority Business Development Program Reform Act of 1987: Hearing Before the Senate Committee on Small Business, 100th Cong., 2d Sess. 109-110 (1988) (statement by Sen. D'Amato); *Id.* at 193-202 (statement by Sen. Levin); *Id.* at 8, 189-191 (statement by Sen. Kerry); *Id.* at 15-18 (statement by Sen. Sasser); 134 Cong. Rec. 31491-31492 (1988); 134 Cong. Rec. 30057 (1988); 133 Cong. Rec. 33314-33316 (1987) (testimony of Cong. LaFalce); The Small Business Competitiveness Demonstration Program Act of 1988: Hearings on S. 1559 Before the Senate Committee on Small Business, 100th Cong., 2d Sess.

> (1988); A bill to Reform the Capital Ownership Development Program: Hearings on H.R. 1807 Before the House Subcommittee on Procurement, Innovation, and Minority Enterprise Development, Committee on Small Business, 100th Cong., lst Sess. (1987); To Present and Examine the Result of a Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program; Hearings Before the Senate Small Business Committee, 100th Cong., lst Sess. (1987); 134 Cong. Rec. 31493 (1988) (statement of Sen. Weiker); H. Conf. Rep. No. 1070, 100th Cong., 2nd Sess. 73 (1988), reprinted in 1988 U.S.C.C.A.N. 5401, 5507; 124 Cong. Rec. 29641 (1978) (testimony of Sen. Glenn); *id.* at 2944 (statement by Sen. Heinz); To Amend the Small Business Act to Extend the Current SBA 8(a) Pilot Program: Hearings on H.R. 5612 Before the Senate Select Committee on Small Business, 96th Cong., 2d Sess. (1980); Small and Minority Business in the Decade of the 1980's Pt. 1, House Committee on Small Business, 97th Cong., 1st Sess. (1981); see also Hearings on Minority Business and its Contributions to the U.S. Economy, Senate Committee on Small Business, 97th Cong. 2d Sess. (1982); *id.* at 10, 33-34, 65, 106, 114, 118, 120, 220, 221, 241; Small Business and the Federal Procurement System, Hearings Before the Subcommittee on General Oversight, House Committee on Small Business, 97th Cong., lst Sess. (1981); Hearings on Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program Before the Senate Committee on Small Business, 98th Cong., lst Sess. (1983); Hearings on Women Entrepreneurs: Their Success and Problems

> Before the Senate Committee on Small Business, 98th Cong., 2d Sess. (1984); Hearing on the State of Hispanic Small Business in America; Minority Enterprise and General Small Business Problems of the Committee on Small Business, 99th Cong., 2d Sess. (1986).

(R. 10th Cir. # 14, Brief 29-34.)

In an opinion dated February 16, 1994, *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994), the United States Court of Appeals for the Tenth Circuit affirmed the decision of the District Court. The Tenth Circuit held:

> *Fullilove* controls. . . . [I]f Congress has expressly mandated a race-conscious program, a court must apply a lenient standard, resembling intermediate scrutiny, in assessing the program's constitutionality. (App. 15.)
>
> * * *
>
> If particularized findings to justify implementation of a federal remedial program are not required of a state . . . they clearly are not required of a federal agency, such as CFLHD, which Adarand concedes is obliged to administer the remedial program.[14]

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[14] The Tenth Circuit states: "The conclusion that CFLHD is acting with the bounds of the statutory authority of the Small Business Act is impelled by Adarand's own concession that the CFLHD's implementation of the SCC program was not beyond the agency's delegated power under section 502." (App. 21.) Adarand made no such concession. Adarand consistently argued, in its opening brief and its reply brief, that the SCC provision was beyond the mandate of Congress. (R. 10th Cir. # 11, Brief 16-28 and R. 10th Cir. # 17, Brief 3-9.)

> The lesson that we glean from *Fullilove* and *Croson* is that the federal government, acting under congressional authority, can engage more freely in affirmative action than states and localities. (App. 18.)
>
> * * *
>
> We also disagree with Adarand's argument that Congress must mandate precise percentage goals for minority small business participation. Such a position ignores the principle lesson of *Fullilove*. The splintered *Fullilove* Court did not uphold the challenged federal program *because* a specific percentage set-aside was mandated by Congress, but rather because the program, *in spite* of the racial and ethnic preference, satisfied equal protection requirements. (Emphasis in original.) (App. 21.)
>
> * * *
>
> Because Adarand stipulates that section 502 satisfies the evidentiary requirements of *Fullilove*, the only question to be resolved is whether the SCC program is narrowly tailored to achieve the remedial purpose of section 502. We hold that it does.[15] (App. 22.)

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[15] The statement that "Adarand stipulates" is a mischaracterization of Adarand's Reply Brief. The Brief states: "Adarand concedes, *for the sake of discussion*, that the evidence is sufficient to satisfy the evidentiary requirements of *Fullilove*. However this concession is not enough to save the Federal Defendants' argument." (App. 43.) (Emphasis added.) By adding the language "for the sake of discussion," Adarand was stating that for purposes of the discussion it could be assumed that the evidence met the requirements of *Fullilove*. This is much different from a stipulation. Adarand simply did not stipulate as indicated by the opinion of the Tenth Circuit.

* * *

> Having rejected Adarand's arguments, and having held that the district court did not err in relying on *Fullilove* rather than *Croson*, that accordingly, no *Croson* findings were necessary, and that the Small Business Act which authorized the SCC program meets the constitutional requirements, we affirm the district court's order of April 21, 1992, in favor of the Government. (App. 24.) (Internal citations have been omitted.)[16]

A Petition for *writ* of *certiorari* was filed on May 17, 1994. The *writ* of *certiorari* was granted on September 26, 1994.

SUMMARY OF ARGUMENT

When it adopted the Federal Construction Procurement Program at issue in this case, Congress selected race as the primary factor for the awarding of federal construction procurement contracts by the federal government. The use of race is the use of a classification that undermines the Constitution's guarantee of equal protection.

In considering the use of race by Congress regarding such matters as the issuance of federal construction contracts, this Court has traditionally used "the most rigid scrutiny" to determine whether Congress has violated the equal protection component of the Due Process Clause of

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[16] Although the Tenth Circuit Court of Appeals stated that the CFLHD was "not itself subject to the STURAA implementing regulations," the Court made no finding regarding the application of STURAA to this case. (App. 8.)

the Fifth Amendment. Regarding issues such as federal construction contracts, no decision of this Court has ever departed from the application of "strict scrutiny." While this Court has held that a lessor standard of review may apply when First Amendment issues are at stake, First Amendment issues are not involved in this case. Moreover, this Court has refused to impose a lesser duty on the federal government in meeting the Constitution's requirement for equal protection.

The application of "strict scrutiny" to the race-conscious Federal Construction Procurement Program requires that the federal government demonstrate both a "compelling governmental interest" for using race and that the means selected is "narrowly tailored." An examination of the federal government's alleged factual basis for adopting the race-conscious program reveals that it contains no evidence of a pattern or practice of discrimination; merely asserts what it purports to prove; and, at best, is an allegation of "societal discrimination." Thus, there is no evidence of a "compelling governmental interest."

The existence of the race-conscious Federal Construction Procurement Program for more than thirteen years, with no end in sight, demonstrates that it is not "narrowly tailored." Moreover, since the program is not linked to identified discrimination, it is impossible to assess whether the program is "narrowly tailored."

Even if "intermediate scrutiny" were the proper standard for reviewing the constitutionality of the race-conscious Federal Construction Procurement Program, and it is not, the program fails to survive. Even under the relaxed standard, Congress failed to provide "meaningful

evidence" that "actually comports with fact" to justify its use of race in awarding federal contracts. In addition, the means selected were not "substantially tailored" since "maximum practicable" permits the award of federal contracts far beyond that necessary to ameliorate past discrimination, that is, rising to 100 percent. This is especially the case since the race-conscious program has no logical stopping point.

The fact that it is a private individual who has made the decision to issue a subcontract on the basis of race is irrelevant since that individual is provided a financial inducement, under the race-conscious provisions of the Federal Construction Procurement Program, to engage in that conduct. The fact that this act is authorized by federal law and undertaken with federal funds makes it an action by the federal government.

While Congress may have had a basis for the adoption of a program authorizing the set-aside of 5 percent of government contracts on the basis of race, although Adarand disputes that it had such a basis, the decision by the CFLHD to adopt a program in which 12 to 15 percent of its contracting funds are apportioned on the basis of race is without the factual basis required by this Court. The CFLHD has demonstrated neither a "compelling governmental interest" for its decision nor that its program is "narrowly tailored."

ARGUMENT

I. THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM MAKES RACE THE DECIDING FACTOR IN THE AWARD OF MANY FEDERAL CONSTRUCTION SUBCONTRACTS.

The Federal Construction Procurement Program not only employs race as a factor, race is the primary factor

used to determine whether an enterprise is a DBE and, therefore, entitled to the preferential treatment accorded under the program implemented by the CFLHD.[17] That is, an individual is presumed to be "disadvantaged" if that individual is one of those listed. The Federal Construction Procurement Program does not define "disadvantaged" in "race-neutral terms," instead the program presumes that members of the listed races are "disadvantaged."

Thus, the payment of a monetary bonus to a prime contractor, in accordance with the SCC provision, turns upon the race of the subcontractor. The definition of "social and economic disadvantage" obviously favors racial minorities:

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[17] 15 U.S. C. § 644(g)(2)(B) specifically incorporates by reference § 8(a) [15 U.S.C. § 637(a)] of the SBA and makes no reference to section 8(d) [15 U.S.C. § 637(d)]. Section 8(d) is the provision that contains the "presumption" regarding race.

The SBA, over the history of the program and since the inclusion of § 8(d), has, however, treated § 8(a) and § 8(d) as interchangeable. In other words, the Small Business Administration, and other agencies that use the regulations promulgated by the Small Business Administration, including the Department of Transportation (DOT), have treated § 8(a) and § 8(d) as if the presumption applied to both. Congress has, over the years, had many opportunities to reverse this policy of the Small Business Administration and has failed to do so. Furthermore, the Justice Department has conceded that the SBA is race-conscious. (Opp. to Pet. 3.)

In any event, the funding for the West Dolores project was provided by § 106(a)(8) of STURAA and STURAA incorporates by reference the SBA's presumption under 15 U.S.C. § 637(d). Pub. L. 100-17, 101 Stat. 146, § 106(c).

> Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

15 U.S.C. § 637(a)(5). "Economically disadvantaged" means:

> those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

15 U.S.C. § 637(a)(6).

Thus, only individuals who are "socially disadvantaged," that is, of certain specified racial and ethnic status can be "economically disadvantaged."[18] In addition, racial minorities, and only racial minorities, are entitled to a presumption of "disadvantage" as follows:

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[18] States or other governmental bodies receiving federal highway funds (recipients) must determine whether an entity is "disadvantaged." If the entity seeking certification is not a "minority" the governmental body looks no further; the entity is presumed not to be "disadvantaged." Economic data is not examined, other than to establish that the business is "small," that is, it has annual receipts of less than $17 million.

"Recipients should always make a determination of social disadvantage before proceeding to make a determination of economic disadvantage. *If the recipient determines that the individual is not socially disadvantaged, it is not necessary to make the economic disadvantage determination.*" 49 C.F.R. Pt. 23, Subpt. D, App. C. (Emphasis added.)

> The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.

15 U.S.C. § 637(d)(3)(C).

This Court has held that a racial classification is "a line drawn on the basis of race and[/or] ethnic status," *Regents of the University of California v. Bakke*, 438 U.S. 265, 289 (1978), and that the Constitution's guarantee of equal protection is violated if persons of different races "are not accorded the same protection." *Id.* (Emphasis added.) The Federal Construction Procurement Program is race-conscious. Under that program, a member of a listed minority group obtains DBE status merely by proving that individual's membership in one or more of the "presume[d]" disadvantaged minorities.[19] Once membership in one of the groups "presume[d]" to be disadvantaged is established, the individual is certified as a DBE.[20]

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[19] *See* 13 C.F.R. 124.105(b); and 48 C.F.R. § 52.219-8.

[20] "In making certification decisions, the recipient (state or local government) relies on this presumption, and does not investigate the social or economic status of individuals who fall into one of the presumptive groups." 49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition). This is the inverse of the situation described in footnote 18. That is, if the entity seeking certification is a "minority," the governmental body looks no further; the entity is presumed to be "disadvantaged." Economics is not examined, except to establish that the "business" is a "small business." *See* footnote 7 for an explanation of why the above cited regulations are applicable to this case.

Nothing else is required.[21] The Federal Construction Procurement Program is clearly race-conscious because it establishes classifications and draws lines on the basis of race or ethnic status.

II. STRICT SCRUTINY IS THE STANDARD OF REVIEW THIS COURT REQUIRES FOR A RACE-CONSCIOUS PROCUREMENT PROGRAM, INCLUDING ONE MANDATED BY CONGRESS.

The Federal Construction Procurement Program is race-conscious and, as such, is subject to strict scrutiny under the Equal Protection component of the Due Process Clause of the Fifth Amendment since "the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth." *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987). This Court traditionally uses "the most rigid scrutiny" in considering violations of the equal protection component of the Due Process Clause of the Fifth Amendment. *Korematsu v.*

[21] Although the DBE status of a minority can be "rebutted," the burden to "rebut" the DBE status of an entity is placed on third parties. 49 C.F.R. § 23.69. Thus, the party challenging the DBE status of an entity must provide evidence that the challenged minority is not "socially and economically disadvantaged." The burden is on the wrong party. The party seeking to be benefitted by the program should have the burden of proving, not just his race or ethnic origins, but the nature of his "social" and/or "economic disadvantage." Moreover, the burden should be on the federal government to ensure that the benefits of a federal program are accruing to entities based upon their economic disadvantage, not just their race.

United States, 323 U.S. 214, 216 (1944).[22] "Most rigid scrutiny" is "strict scrutiny." In fact, Justice Marshall, in his concurring opinion in *Fullilove*, recognized that the "conventional" test for reviewing "governmental programs employing racial classifications" is "strict scrutiny." *Fullilove*, 448 U.S. at 519.

Nonetheless, the Tenth Circuit Court of Appeals applied a different and, therefore improper, standard of review to the race-conscious government contracting program challenged herein:

> [I]f Congress has expressly mandated a race-conscious program, a court must apply *a lenient standard, resembling intermediate scrutiny*, in assessing the program's constitutionality.

(App. 15.) (Emphasis added.) The United States Court of Appeals for the Tenth Circuit reached its conclusion by combining the *Fullilove* opinion authored by Chief Justice Burger with the concurring opinion in that case authored

[22] "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. It is not to say that all such restrictions are unconstitutional. It is to say that *courts must subject them to the most rigid scrutiny.*" *Korematsu v. United States*, 323 U.S. at 216. (Emphasis added.) *See also Bakke*, 438 U.S. at 299 (when decision-making touches upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear because of his race or ethnic background is precisely tailored to serve a compelling governmental interest); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (the Equal Protection Clause demands that racial classifications be subjected to the "most rigid scrutiny"); and *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("[c]lassifications based solely upon race must be scrutinized with particular care since they are contrary to our traditions and hence constitutionally suspect").

by Justice Marshall.[23] This holding of the Tenth Circuit is in error. A "lenient standard, resembling intermediate scrutiny" is not the standard of review for government contracting programs set forth by a majority of the justices in *Fullilove*, nor is it the standard set forth in other decisions of this Court.[24]

Although there is some question regarding whether Chief Justice Burger's opinion was based upon a "strict scrutiny" standard, he clearly required the use of a standard higher than intermediate scrutiny:

> We recognize the need for *careful judicial evaluation* to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is *narrowly tailored* to the achievement of that goal.

Fullilove, 448 U.S. at 480. (Emphasis added.) Furthermore, Chief Justice Burger wrote:

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[23] "A majority of the *Fullilove* Court agreed that strict scrutiny is not the proper test for evaluating a race-conscious remedial program authorized by an act of Congress." (App. 16, part of footnote 10.)

[24] The concurring opinion authored by Justice Marshall supports an "intermediate scrutiny" standard for the *Fullilove* factual situation because Justice Marshall rejects both "strict scrutiny" and "the minimally rigorous rational-basis standard of review." *Fullilove*, 448 U.S. at 519. The constitutional test is met, wrote Justice Marshall, when the program is "designed to further remedial purposes [which] serve important governmental objectives and are substantially related to achievement of those objectives." *Fullilove*, 448 U.S. at 519. But Justice Marshall was joined by only two other Justices, *i.e.* Justice Brennan and Justice Blackmun.

> *Any preference* based on racial or ethnic criteria must necessarily receive a *most searching examination* to make sure that it does not conflict with constitutional guarantees.

Fullilove, 448 U.S. at 491. (Emphasis added.) "Careful judicial evaluation," "narrow tailor[ing]" and "most searching examination" indicate a level of scrutiny much closer to "strict scrutiny" than to "intermediate scrutiny."

Chief Justice Burger articulated a two step analysis for reviewing the Public Works Employment Act (PWEA) program at issue in *Fullilove*. However, there is nothing in that analysis from which to infer that he intended any standard other than strict scrutiny. In fact, just the opposite is true as shown by the language quoted above and by the second step of Chief Justice Burger's analysis:

> the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

Fullilove, 448 U.S. at 473. (Emphasis in original.)

Thus, the standard of review articulated by Chief Justice Burger in *Fullilove* was not, as interpreted by the Tenth Circuit, "a lenient standard, resembling intermediate scrutiny," but is the "conventional" "strict scrutiny" standard.[25]

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[25] The conclusion that Chief Justice Burger's standard of review is the conventional standard or strict scrutiny is bolstered by the concurring opinion of Justice Powell:

Therefore, the Tenth Circuit's opinion is in error when it holds "[a] majority of the *Fullilove* Court believed that an intermediate scrutiny analysis should be used to determine whether a congressionally-mandated program passes constitutional muster" and must be reversed. (App. 16, part of footnote 10).

III. THE DECISION OF THIS COURT IN *METRO BROADCASTING* IS NOT DISPOSITIVE OF THIS CASE.

The Tenth Circuit held that *Metro Broadcasting v. FCC*, 497 U.S. 547, 564 (1990):

> Although I would place greater emphasis than the Chief Justice on the need to articulate judicial standards of review in conventional terms, I view his opinion announcing the judgment as substantially in accord with my own views. Accordingly, I join that opinion and write separately to apply the analysis set forth by my opinion in *University of California Regents v. Bakke*, 438 U.S. 265 (1978).
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> * * *
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> [The PWEA] employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a *compelling governmental interest*. (Citing *Bakke*) For the reasons stated in my *Bakke* opinion, I consider adherence to this standard as important and consistent with precedent.
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> * * *
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> Racial classifications must be assessed under *the most stringent level of review* . . . .

Fullilove, 448 U.S. at 496. (J. Powell, concurring.) (Emphasis added.) "Compelling governmental interest" and "the most stringent level of review" are "strict scrutiny."

> put to rest any lingering doubts about the continuing vitality of *Fullilove*: . . . "that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments."

(App. 19.) The Tenth Circuit then concludes:

> the *Metro Broadcasting* majority held that even non-remedial race-conscious measures mandated by Congress are constitutionally permissible if they satisfy intermediate scrutiny.

(App. 19.)

Although this court held in *Metro Broadcasting* that "race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments" and that "intermediate scrutiny" is the proper standard of review, *Metro Broadcasting* involved a much different set of facts than the case at bar. *Metro Broadcasting*, 497 U.S. at 565-66. *Metro Broadcasting* involved concerns with the First Amendment:

> '[T]he people as a whole retain their interest in free speech by radio [and other forms of broadcast] and their collective right to have the medium function consistently with the ends and purposes of the First Amendment,' and '[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.'

Metro Broadcasting, 497 U.S. at 567.

The case at bar does not involve First Amendment concerns in any way. Although the need for "diversity" in certain areas, *i.e.*, broadcasting, police forces, and school

faculties and student bodies, as set forth in *Metro Broadcasting*, may provide "reasons for the classification," none of those situations exist in the case at bar. *Metro Broadcasting*, 497 U.S. at 601 (Stevens, J., concurring.) This case involves the erection of guardrails along a 4.7 mile section of national forest highway in an isolated and sparsely-populated region of southwestern Colorado. Moreover, Congress did not identify "diversity" in government contracting as a reason for the racial classifications used in the Federal Construction Procurement Program. *See* 15 U.S.C. § 631(f)(1). Thus, the holding of this Court in *Metro Broadcasting* is inapplicable to the case at bar.

Furthermore, Justice Stevens' concurring opinion in *Metro Broadcasting* cannot be cited as a basis for weakened scrutiny for programs that award government construction contracts on the basis of race since he demands that the reasons for racial classifications used in such programs be "clearly identified and unquestionably legitimate." *Metro Broadcasting v. FCC*, 497 U.S. at 601, citing his dissenting opinion in *Fullilove*. In his dissenting opinion in *Fullilove*, Justice Stevens wrote "[u]nless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the Court should not uphold this kind of statute." *Fullilove*, 448 U.S. at 545 (Justice Stevens dissenting).[26]

While Justice Stevens listed several situations where race-conscious measures are "unquestionably legitimate,"

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[26] Regarding the SBA, Congress has done neither. It has not "clearly articulate[d] the need and basis for [the] racial classification" and has not "tailor[ed] the classification to its justification." "The Court should not uphold this . . . statute." *Fullilove*, 448 U.S. at 545 (Justice Stevens dissenting).

the list does not include highway construction or government contracts. *Metro Broadcasting*, 497 U.S. at 601-602.[27] Justice Stevens' decision not to include contracting as an "unquestionably legitimate" race-conscious measure and his dissent in *Fullilove* manifest his views that government contracting requires a different level of scrutiny than, for example, public broadcasting and that congressionally-mandated public works laws are subject to a more rigorous standard of review, *i.e.*, strict scrutiny.

As this Court has held on numerous occasions, strict scrutiny is the traditional standard of review to be applied to race-conscious programs like the one at issue, even if the program is mandated by Congress. The facts of the case at bar are clearly distinguishable from the facts found to require intermediate scrutiny in *Metro Broadcasting*. Since the decision of the Tenth Circuit is contrary to the decisions of this Court regarding the proper standard of review for race-conscious construction contract programs, the decision of the Tenth Circuit must be reversed.

IV. THE HOLDING OF THE TENTH CIRCUIT COURT OF APPEALS THAT CONGRESS "CAN ENGAGE MORE FREELY IN AFFIRMATIVE ACTION THAN STATES AND LOCALITIES" IS IN ERROR.

The Tenth Circuit held:

> The lesson that we glean from *Fullilove* and *Croson* is that the federal government, acting under congressional authority, can engage more

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[27] That list is "extremely narrow" and includes "broadcast diversity;" "an integrated police force;" "a public school faculty;" and "the student body of a professional school." *Metro Broadcasting*, 497 U.S. at 601-602.

> freely in affirmative action than states and localities.

(App. 18.) This holding deviates from the holdings of this Court:

> In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.

Bolling v. Sharpe, 347 U.S. at 500.[28]

The holding of the Tenth Circuit with regard to the relationship of *Fullilove*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Metro Broadcasting* is in error. Since none of the opinions written in *Fullilove* were a plurality, let alone a majority opinion, *Fullilove* cannot be read to overrule existing Supreme Court precedent.

As for *Metro Broadcasting*, its factual situation is clearly distinguishable from, and is not dispositive of, the case now before the Court. More importantly, *Metro Broadcasting* cannot be cited for the proposition that Congress is treated differently by the Constitution than other governmental bodies when a race-conscious construction contract program is at issue. The discussion of Congressional authority in *Croson*, as it related to the *Fullilove* decision, addressed Congressional power under § 5 of the Fourteenth Amendment, which is not at issue in this case.

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[28] "The Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of racial classifications." *Metro Broadcasting*, 497 U.S. at 604 (O'Connor, J. dissenting).

Croson, 488 U.S. at 490.[29] No decisions of this Court support the holding of the Tenth Circuit that "the federal government, acting under congressional authority, can engage more freely in affirmative action than states and localities" when a race-conscious construction program is at issue. Although Congress may have greater remedial authority, the constitutional standard for reviewing a construction contract program authorized by Congress or states is the same. The decision of the Tenth Circuit is in conflict with *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 275 (1986), *Croson*, *Bolling v. Sharpe*, and *Shaw v.Reno*, 509 U.S. ___, 125 L.Ed.2d 511, 526 (1993) and must be reversed.

V. THE RACE-CONSCIOUS FEDERAL CONSTRUCTION PROCUREMENT PROGRAM FAILS STRICT SCRUTINY AND IS UNCONSTITUTIONAL.

As indicated above, strict scrutiny is the standard of review that must be applied in this case. For the Federal Construction Procurement Program to survive strict scrutiny it must be "narrowly tailored" to a "compelling governmental interest." *See Shaw v. Reno*, 509 U.S. ___, 125 L.Ed.2d 511, 526.

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[29] Congress' § 5 authority is not implicated in this case since it involves a federal program implemented by a federal agency and since no state or local government is involved.

A. THERE IS NO "COMPELLING GOVERNMENTAL INTEREST" THAT JUSTIFIES THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM CHALLENGED IN THIS ACTION.

This Court has held that an attempt to remedy past discrimination is a "compelling governmental interest." Yet, Congress did not attempt to identify the discrimination to be remedied by this Federal Construction Procurement Program. As a result, the Federal Construction Procurement Program cannot survive strict scrutiny.

The record contains no evidence of any pattern or practice of discrimination against minorities in federal procurement activities. The racial preference codified at 15 U.S.C. § 644(g) appears as part of the Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, 102 Stat. 3853 (1988).[30] This Act, which amended the SBA, focused almost exclusively on the section 8(a) set-aside program, 15 U.S.C. § 637(a). It contained no findings identifying the discrimination to be remedied by the provision being challenged in this case; indeed, it contained no findings identifying any discrimination at all. The legislative history is of no use in filling this gap; it, too, contains no evidence of a pattern or practice of discrimination against minorities in government procurement activities.[31]

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[30] The racial preference established by § 106 of STURAA was in effect for more than eleven years. STURAA was in force from 1987 through 1993, but the Surface Transportation Assistance Act of 1982, in which the language of § 105(f) was almost identical to the language of § 106(c) of STURAA, was in effect from 1982 to 1987. Pub. L. 97-424, 96 Stat. 2100.

[31] The legislative reports which accompanied Pub. L. 100-656 are reprinted at 1988 *U.S. Code Cong. & Admin. News* 5401 *et seq.*

At the trial court level, Respondents argued that "[i]n passing Public Law 95-507,[32] Congress made specific findings with respect to the utilization of socially and economically disadvantaged business concerns, as well as findings indicating the need to promote their participation in federal procurement." However, these "findings," which are codified at 15 U.S.C. § 631(f)(1) and set forth on pages 11-12, do not meet the Court's requirement for demonstration of a "compelling governmental interest."

The "findings" contain a statement of the reasons which caused Congress to adopt the racial preference provisions of the Federal Construction Procurement Program. However, they contain no evidence of a pattern or practice of discrimination in government contracting against members of "disadvantaged" ethnic groups. Rather, the "findings" merely assert what they purport to prove. Conclusory statements such as these "are of little probative value in establishing identified discrimination" in federal procurement. *Croson*, 488 U.S. at 501. Furthermore, the legislative history for Public Law 95-507 contains no empirical support for these "findings".[33] Therefore, these "findings" cannot be considered of value in determining whether the government has met its heavy burden of providing "extraordinary justification" for the racial classification in this case. (*See Shaw v. Reno*, 509 U.S. ___, 125 L.Ed.2d 511, 526, *citing Brown v. Board of Education*, "A

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[32] Pub. L. 95-507, styled as the Small Business Investment Act of 1978, also amended the SBA.

[33] The legislative reports which accompanied Pub. L. 95-507 are reprinted at 1978 *U.S. Code Cong. & Admin. News* 3835 *et seq.*

racial classification, regardless of its motivation, is presumptively invalid and can be upheld only upon an *extraordinary justification.*" (Emphasis added.))

In sum, Congress did not have persuasive evidence of a pattern or practice of intentional discrimination either by federal agencies or their prime construction contractors. Without such evidence of prior discrimination there is no "compelling governmental interest" that justifies the use of race in government decision-making. This shortcoming renders the Federal Construction Procurement Program constitutionally deficient under *Fullilove*, 448 U.S. at 480, as well as *Wygant*, 476 U.S. at 274 and *Croson*, 488 U.S. at 505. "[T]he statute [is] invalid because, on its face, it could not be explained on grounds other than race." *Shaw v. Reno*, 509 U.S. ___, 125 L.Ed.2d at 527.

Moreover, even if Congress made findings with the specificity this Court demands, and it did not, those findings were made more than a decade ago. If there was a pattern or practice of racial discrimination – and Respondents have testified there was not – the defect was cured long ago. Thus, what is present here is a remedy that is "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." *Wygant*, 476 U.S. at 276.

Respondents admit that the CFLHD has never discriminated on the basis of race.[34] Respondents take the position that "societal discrimination" is sufficient to justify the use of a race-conscious program by that agency in

[34] In a deposition taken on March 19, 1991, Mr. Jerry Budwig, Division Engineer of the CFLHD testified "I would say that there has not been," when asked if there had ever been a case in which the CFLHD discriminated against a contractor or subcontractor on the basis of race. (App. 45-46.)

Colorado. However, this Court has held that "societal discrimination" is not enough: "This Court never has held that societal discrimination alone is sufficient to justify a racial classification." *Wygant*, 476 U.S. at 274. The reason is simple, "it is almost impossible to assess whether [this] plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." *Croson*, 488 U.S. at 498. Thus, "societal discrimination" cited by Congress does not provide sufficient constitutional authority to justify the use of a race-conscious program by federal officials in Colorado.

Despite the requirement of this Court for a showing of a "compelling governmental interest" before the use of race as a basis for governmental decision making, the United States Court of Appeals for the Tenth Circuit held that the "*significant governmental purpose* of providing subcontracting opportunities for small disadvantaged business enterprises" satisfies this Court's requirement. (App. 23.) (Emphasis added.) However, "significant governmental purpose" is not what this Court requires. This Court requires a "compelling governmental interest." No showing of a "compelling governmental interest" has ever been made by Congress for the race-conscious Federal Construction Procurement Program.

> [A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.'

Croson, 488 U.S. at 498. As a result, the decision of the United States Court of Appeals for the Tenth Circuit must be reversed.

B. THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM IS NOT "NARROWLY TAILORED."

The second prong of the strict scrutiny test is "narrow tailoring." That is, the race-conscious program must be "narrowly tailored" to meet the "compelling governmental interest" identified. *Shaw v. Reno*, 509 U.S. ___, 125 L. Ed. 2d at 526.

Yet, the Federal Construction Procurement Program is not narrowly tailored. Narrow tailoring requires that the race-conscious remedy "not last longer than the discriminatory effects it is designed to eliminate." *Fullilove*, 448 U.S. at 523 (Powell, concurring). Moreover, the Federal Construction Procurement Program must be "limited in extent and duration." *Fullilove*, 448 U.S. at 489. *See* also *Croson*, 488 U.S. at 498.

In finding the PWEA program challenged in *Fullilove* constitutional, Chief Justice Burger focused on the fact that the PWEA was "a short-term measure to alleviate the problem of national unemployment." *Fullilove*, 448 U.S. at 457.[35] Without a statutory provision establishing a limited time period for the use of the race-conscious remedy, the program cannot be said to be narrowly tailored. "Such

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[35] "The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration. . . . " *Fullilove*, 448 U.S. at 489 (Opinion of Burger, C.J.) "The . . . set-aside is not a permanent part of federal contracting requirements. As soon as the PWEA program concludes, this set-aside program ends. The temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." *Fullilove*, 448 U.S. at 513 (Concurring opinion of Powell, J).

findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups *is a temporary matter*, a measure taken in the service of the goal of equality itself." *Croson*, 488 U.S. at 510. (Emphasis added.)

The Federal Construction Procurement Program challenged here has been in place for more than thirteen years and shows no sign of ending in the foreseeable future.[36] (R. 10th Cir. # 11, Aplt. App. 326-327.) The law contains no automatic sunset provision and there is no reason to believe that the matter will be revisited by Congress in the near future, contrary to the view of the Tenth Circuit:

> [T]he SCC program is "appropriately limited in extent and duration" because federal procurement and construction contracting practices are subject to regular "reassessment and reevaluation by Congress."

(App. 23.) The Federal Construction Procurement Program is not a "short term measure" like the statute held by this Court in *Fullilove* to pass constitutional muster. *Fullilove*, 448 U.S. at 457. Nor is the Federal Construction Procurement Program supported by findings sufficient to "assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter," as required by *Croson*. *Croson*, 488 U.S. at 520. Here, without congressional action to repeal or amend it, the program will go on forever.

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[36] Mr. Budwig: "I'm not aware that [the Government's DBE program's] end is in sight." App. at 46-47. Not only does this program appear to be here to stay, but it represents hundreds of millions of federal dollars awarded solely on the basis of race.

A second aspect of narrow tailoring is that the program must be designed to remedy clearly identifiable discrimination. Yet, since Congress failed to identify the discrimination this program seeks to remedy, it suffers from the same deficiency Justice O'Connor identified in *Croson*:

> [I]t is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way.

Croson, 488 U.S. at 498.

"Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307. *See also Fullilove*, 448 U.S. at 497 (Powell, J., concurring) ("[I]f the set-aside merely expresses a congressional desire to prefer one racial or ethnic group over another, [it] violates the equal protection component in the Due Process Clause of the Fifth Amendment.")[37]

Yet, "preferring members of one group for no other reason than race" is precisely what Congress did in the Federal Construction Procurement Program. The Federal Construction Procurement Program directs federal agencies to set goals for minority participation at the "maximum practicable" level. 15 U.S.C. § 644(g). "Maximum

[37] Although this precept has never been the subject of a majority opinion, Adarand submits that this is because the precept is so readily apparent that it has never needed express statement.

practicable" has no reasonable limits. There is a limit to the persons who have suffered from discrimination, therefore, on its face, this near limitless preference cannot be tied to any legitimate remedial objective. Indeed, the goal's requirement has "no logical stopping point" other than the complete exclusion of all non-minority firms from government work. *Wygant*, 476 U.S. at 275 (1986). Instead, it is a race-conscious program that "prefer[s] one racial or ethnic group over another." *Fullilove*, 448 U.S. at 497 (Powell, J., concurring) This Congress cannot do.

Such an objective is invidious under any reading of the law. It sweeps far beyond the legitimate scope of race-conscious governmental action. Certainly, such a statute cannot be said to be "narrowly tailored" to a compelling governmental interest.

In sum, the race-conscious Federal Construction Procurement Program violates both prongs of the strict scrutiny standard. These violations render it unconstitutional.

VI. THE RACE-CONSCIOUS FEDERAL CONSTRUCTION PROCUREMENT PROGRAM IS UNCONSTITUTIONAL EVEN UNDER INTERMEDIATE SCRUTINY.

Respondents argue that intermediate scrutiny should be applied in this case. However, this argument suffers from two fatal flaws. First, as indicated above, it is simply incorrect; strict scrutiny is the proper standard of review for all race-conscious government construction contracting programs regardless of whether Congress has mandated the action. Second, the race-conscious Federal Construction Procurement Program is unconstitutional even under this relaxed standard of review.

Intermediate scrutiny requires that a statute be "related substantially" to the achievement of an "important public purpose." *Metro Broadcasting v. FCC*, 497 U.S. at 565. The desire to remedy past racial discrimination is unquestionably an important governmental purpose. Thus, the question in this case is whether the Federal Construction Procurement Program is "substantially related" to the achievement of this purpose.

The first step in the use of intermediate scrutiny is whether Congress possessed an adequate factual basis for the conclusion that members of groups favored by the Federal Construction Procurement Program have been subjected to racial discrimination. The quantum of evidence required to make this showing is not as high as under strict scrutiny.

However, the burden of persuasion remains on the proponent of the challenged classification. *Heckler v. Mathews*, 465 U.S. 728, 744 (1984); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Furthermore, conclusory assertions are not enough to carry this burden. *Lamprecht v. FCC*, 958 F. 2d 382, 393 (D.C. Cir. 1992), *quoting Craig v. Boren*, 429 U.S. 190, 208-209 (1976). Rather, the claim that a statute will substantially advance an important purpose must "at the very least be supported by meaningful evidence." *Lamprecht v. FCC*, 958 F. 2d at 393. Indeed, it is "beyond doubt" that under intermediate scrutiny the proponent of the challenged classification must show that this assertion "actually comports with fact." *Id.* at 394, n. 3, *quoting Craig v. Boren*, 429 U.S. 190, 199 (1976).

The question then becomes: Did Congress possess an adequate factual basis for the conclusion that members of groups favored by the Federal Construction Procurement

Program have been subjected to racial discrimination? The answer is: Congress did not have any evidence of a pattern or practice of discrimination, let alone "meaningful" evidence, identifying a pattern or practice of discrimination in federal construction contracting. Congress did make several "findings" regarding discrimination. *See* 15 U.S.C. § 631(f)(1), *quoted* at pages 11-12. However, these "findings" were not supported by any empirical fact-finding, nor were they shown to "actually comport[] with fact." *Lamprecht*, 958 F. 2d at 394, n. 3, *quoting Craig v. Boren*, 429 U.S. at 199. Instead, the "findings" merely assert what they purport to prove. Clearly, these findings do not and cannot show that the members of each and every ethnic group singled out for preferential treatment by the Federal Construction Procurement Program actually have suffered from, and continue to suffer from, the effects of racial discrimination.

> There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut person in any aspect of the Richmond construction industry. . . . It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry . . . suggests that the city's purpose was not in fact to remedy past discrimination.

Croson, 488 U.S. at 506. (Emphasis in original.)[38]

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[38] Although the *Croson* Court was applying strict scrutiny, this passage is cited as an example of over-inclusiveness which occurs from an assumption that all minorities have suffered from discrimination in the construction industry.

The second step in the inquiry is whether the relationship between the race-conscious provisions of the Federal Construction Procurement Program and the objective of remedying identified discrimination against members of now-favored ethnic groups is sufficiently precise. Once again, this inquiry is somewhat looser than under strict scrutiny. However, the fit between the objective to be reached and the means selected for reaching that objective must remain tight enough to alleviate substantially the identified disadvantages. *Lamprecht v. FCC*, 958 F. 2d at 393. Furthermore, any substantial overbreadth in the chosen remedy renders the remedy unconstitutional. This is the very essence of "substantial basis" review.

The violation, by the Federal Construction Procurement Program, of the second step of intermediate scrutiny is even more clear. The race-conscious provision of the Federal Construction Procurement Program directs each federal agency to set goals for minority participation at the "maximum practicable" level. 15 U.S.C. § 644(g). The near limitless preference of the race-conscious Federal Construction Procurement Program cannot be tied to any legitimate remedial objective. Indeed, it has "no logical stopping point" other than the complete exclusion of all non-minority firms from government work. *Wygant*, 476 U.S. at 275. Thus, this statutory provision sweeps so far beyond any legitimate remedial goal that not only is it impossible to conclude that it is "substantially tailored" to a remedial objective, but it is apparent that its only possible function is to increase the amount of business awarded to minority-owned firms. This is "discrimination for its own sake," which is the very essence of a constitutional violation. *Bakke*, 438 U.S. at 305.

As was the case with strict scrutiny, this discussion of legal standards could be extended considerably, but there is no need to do so, because the race-conscious Federal Construction Procurement Program does not even come close to satisfying either prong of intermediate scrutiny.

Of course, the judiciary may grant some decisions of Congress the respect due a co-equal branch of the federal government. *Metro Broadcasting*, 497 U.S. at 569. Nonetheless, the courts "are still obliged in the end to *review* the government's policy – both the judgmcnt of law that the policy is constitutional and the findings of fact that underlie it." *Lamprecht v. FCC*, 958 F. 2d at 391 (emphasis in original). Even more importantly, this Court has held that it must not defer to the judgment of Congress on matters involving suspect classifications:

> [W]e do not defer to the judgment of the Congress . . . on a constitutional question, and would not hesitate to invoke the Constitution should we determine that [Congress] has not fulfilled its task with appropriate sensitivity to equal protection principles.

Metro Broadcasting, 497 U.S. at 569 (citation omitted).[39] This Court must rule on the constitutionality of the race-conscious Federal Construction Procurement Program despite its adoption by Congress.

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[39] The Tenth Circuit recognized this principle. "In reaffirming *Fullilove* as the proper standard for assessing the constitutionality of benign race-conscious measures, the Court in *Metro Broadcasting* noted that, notwithstanding the 'great weight' given to the decisions of Congress, even congressionally-mandated benign race-conscious measures must satisfy equal protection requirements. 110 S. Ct. at 3011 (citation omitted)." (App. 22.)

In the instant case, the facts do not support the claim that the race-conscious Federal Construction Procurement Program is substantially related to the important objective of remedying past discrimination. As a result, this program should be stricken as unconstitutional even if intermediate scrutiny is the appropriate standard of review.

VII. PRIVATE DISCRIMINATION IS "EVIL" AND JUST AS "ODIOUS TO A FREE PEOPLE" AS IS GOVERNMENTAL DISCRIMINATION.

Respondents assert that the race-conscious Federal Construction Procurement Program is constitutional because the SCC provision "operates as a carrot rather than a stick."[40] Respondents argue that bribing a prime contractor with federal funds to discriminate is less constitutionally offensive than direct discrimination by the U.S. Government.

Private discrimination is "evil:" "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private discrimination." *Croson*, 488 U.S. at 492. Respondents' attempt to hide behind the prime contractor, asserting that it is he and not the federal government that is discriminating on the basis of race, is an artifice and must be rejected. Since federal funds provide the financial inducement to discriminate in accordance with federal regulations, the discrimination is being done by the federal government. Government financing of private discrimination is "evil" and no less "odious to a free people whose

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[40] Opp. to Pet. 18.

institutions are founded upon the doctrine of equality" since it is direct discrimination by the government itself. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *Shaw v. Reno*, 509 U.S. ___, 125 L.Ed.2d at 526.

VIII. THE CFLHD, WHEN EXCEEDING THE GOALS ADOPTED BY CONGRESS, MUST CONDUCT THE INQUIRY REQUIRED BY *CROSON*.

The CFLHD, and not Congress, made the decision to set aside an additional 7 to 10 percent of its contracts for DBEs.[41] That decision in and of itself is also subject to strict scrutiny. Given the suspect nature of racial classifications, "searching judicial inquiry" is necessary to determine what classifications are remedial and "what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Shaw v. Reno*, 509 U.S. ___, 125 L.Ed.2d 511, 526, citing *Croson*.

The SBA provides, in pertinent part:

> Notwithstanding the government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for . . . small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency.

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[41] Congress set the level for small disadvantaged business participation at five (5) percent. 15 U.S.C. § 644(g)(1). The CFLHD has established a goal of between 12 and 15 percent. Thus, the additional 7 to 10 percent is the result of a decision by the CFLHD.

15 U.S.C. § 644(g). Congress set the goal at five percent, therefore a goal above five percent does not and cannot reflect Congressional judgment that the goal is constitutionally legitimate. It is therefore up to the CLFHD to identify and to set forth the factual justification for the goal that CLFHD has adopted and to do so with sufficient specificity to meet the requirements of the Constitution, as required by this Court in *Croson*, 488 U.S. 469. Clearly, the CFLHD did not satisfy the requirements of strict scrutiny before implementing its set-aside program.

Under *Croson*, this Court requires that, in order to implement a race-based remedial program, the CFLHD must show a "strong basis in evidence" for its conclusion that race-based action was justified. *Croson*, 488 U.S. at 500. In making this showing, the CLFHD cannot rely on generalized congressional findings of nationwide discrimination: "If all a [governmental entity] need do is find a Congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity." *Croson*, 488 U.S. at 504. Instead, the CFLHD must identify the discrimination it seeks to remedy "with some specificity" before it can implement race-conscious relief. *Id.*

In *Croson* this Court held that it was "almost impossible to assess whether the Richmond plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." *Croson*, 488 U.S. at 507. That very deficiency exists here since the CFLHD failed to set forth any identified discrimination

that provided the factual basis for its 12 to 15 percent race-conscious program.[42]

In order to be considered "narrowly tailored" under *Croson* the benefits of the provision had to be limited to members of ethnic groups who have actually suffered from a pattern of identified state-sponsored discrimination. *Croson*, 488 U.S. at 506. However, the benefits offered by the CLFHD's decision to set aside an additional 7 to 10 percent of its contracts are available to members of numerous minority groups.[43] Not only is there no evidence that members of these groups have suffered from racial discrimination at the hands of the CFLHD, but even if members of one group have been victimized, there is no evidence that members of other groups have similarly suffered.

CONCLUSION

Congress has adopted a race-conscious program that must be reviewed by this Court through the application of "strict scrutiny" so as to ensure the program's compliance with the Constitution's guarantee of equal protection. The application of strict scrutiny reveals that Congress' race-conscious program is not "narrowly tailored" to serve a "compelling governmental interest," since it seeks to redress historic, general, societal discrimination and not

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[42] In fact, as noted above, CLFHD officials have testified that there is no history of racial discrimination in the CFLHD. (R. 10th Cir. # 11, Aplt. App. 339 & 348.)

[43] *See* footnote 9 for a partial list of the "other minorities" included.

specific acts of discrimination on the basis of race. As a result, the race-conscious Federal Construction Procurement Program, and its application to Adarand, so as to prevent it from competing on an equal basis with other guardrail subcontractors, must be declared unconstitutional and set aside.

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